mary opponent since his incumbency began," and that the court had "no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate." *Ibid.* The court also noted that Congresswoman Eddie Bernice Johnson had testified "that District 24 was drawn for an Anglo Democrat." *Ibid.* In the court's view, appellants' claim "rests upon the shaky ground that much of the dominating Anglo Democratic vote does not bother to vote in the primary with Frost filling in as an unchallenged Anglo." *Ibid.* The court thus found that "the most rational conclusion" is that "Anglo Democrats control this district." *Id.* at 111a-112a.

The district court also concluded that appellants' claim was deficient with respect to the second and third *Gingles* preconditions. See J.S. App. 112a-113a. The court stated that, based on its voting behavior in prior elections, the cohesiveness of the 21.4% African American voting age population is "far from clear." *Id.* at 112a. In addition, the court pointed to the "Anglo cross over rate of 30.75" in general elections, which, the court stated, suggests "the absence of Anglo bloc voting under *Gingles*'s third precondition." *Id.* at 111a.

c. *South and West Texas.* The district court also rejected appellants' claim that the State's redistricting plan violates Section 2, because it did not create a *seventh* Hispanic-majority district in South and West Texas. J.S. App. 121a. The district court explained at the outset that it had rejected the identical argument in *Balderas*; that this Court had summarily affirmed that decision; and that appellants had provided no reason to reject that decision. *Id.* at 124a. In any event, the court went on to reject that claim on its merits.

The district court found that appellants had failed to prove that "their demonstration plan would satisfy *Gingles*," given that its districts were so "unusually shaped." J.S. App. 125a. But even excusing the threshold "*Gingles* problems" with

their plan (Plan 1385C), the court held that appellants "failed to make the necessary showing under § 2." *Id.* at 126a.

The district court explained that proportionality—an important factor, see *Johnson* v. *De Grandy*, 512 U.S. 997, 1020 (1994)—cuts against appellants' Section 2 claim. The court noted that other courts that had analyzed proportionality had "us[ed] the same frame of reference for that factor and for the factors set forth in *Gingles*." J.S. App. 129a. In this case, that frame of reference is South and West Texas. The court noted that "six out of the seven districts in South and West Texas," or about 85% of the districts, are "citizen voting age majority [Hispanic] districts." *Ibid.* Thus, because "Latinos comprise 58% of the citizen voting age population in South and West Texas," the court found, "proportionality is satisfied as to that area." *Ibid.*

Furthermore, the court found that the plan proposed by appellants would not yield seven "*effective* majority-minority districts." J.S. App. 130a. The court explained that one of the districts in appellants' Plan 1385C "has a Hispanic citizen voting age population of only 50.3%, and five of the seven districts have a Hispanic citizen voting age population that is below 60%." *Ibid.* In addition, the court noted that "because of the lower turnout of Latino voters, a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district." *Id.* at 131a. Finally, the court concluded that "the six Hispanic citizen voting age population majority districts drawn in [the State's plan] are effective Hispanic opportunity districts." *Id.* at 133a.

d. Judge Ward concurred in part and dissented in part. J.S. App. 171a-200a. He agreed with the court's judgment "insofar as it rejects the claims surrounding District 24." *Id.* at 173a. With respect to the claims involving South and West Texas, however, Judge Ward concluded that "[t]he state ac-

tion in this case unlawfully dilutes the strength of the Latino voters residing in former District 23." *Ibid.*

4. Plaintiffs appealed to this Court. 28 U.S.C. 2101(b). On October 18, 2004, the Court issued an order vacating the judgment and remanding the case to the district court for further consideration in light of *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004). *Jackson* v. *Perry*, 125 S. Ct. 351, 351-352 (2004).

5. On June 9, 2005, the district court issued a decision holding that the Texas redistricting plan was constitutional in light of *Vieth*. J.S. App. 1a-55a. The district court briefly rejected the renewed Section 2 challenge, holding that it had "examined and rejected all of the claims in detail in [the court's] previous opinion." *Id.* at 39a-40a. Judge Ward filed a specially concurring opinion. *Id.* at 45a-55a. With respect to the Section 2 issues, he adhered to the views expressed in his opinion prior to the remand. *Id.* at 55a n.6.

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act guarantees the members of a protected class an equal opportunity with other members of the electorate to "elect representatives of their choice." 42 U.S.C. 1973. A plaintiff alleging a violation of Section 2 bears the burden of proving that the challenged practice has the effect of denying or abridging such an opportunity under the framework established by *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). The district court concluded that appellants failed to meet that burden. That decision is supported both by this Court's precedents and by the district court's factual findings, and should be affirmed.

I. In rejecting appellants' Section 2 challenge to the elimination of District 24, the district court found that African Americans did not control the district in the court-ordered 2001 plan. Appellants themselves recognize that, in order to satisfy the first *Gingles* precondition, they must at a minimum

show that they could draw a district in which African Americans would control the outcome of elections and thus be able to elect the candidate of their choice. Although African Americans constituted less than 22% of the voting population in the district, appellants claimed that African Americans effectively controlled the Democratic primary in the former District 24 and that the Democratic candidate was ordinarily elected in that district. The district court found that appellants failed, however, to carry their burden of proving African American control of the Democratic primary, because appellants "overstate the impact of the Black Democrats' control of the primaries" and "the most rational conclusion" is "that Anglo Democrats control this district." J.S. App. 111a-112a. Those findings are supported by record evidence and are not clearly erroneous. Indeed, it is not surprising that minority voters did not control a district in which they constituted only 22% of the voting age population.

Because appellants failed to establish the fact of effective African American electoral control that they themselves recognize was essential to their claim, the district court properly rejected that claim. Accordingly, this case does not require the Court to resolve the legal issue on which the *Jackson* appellants ground their appeal: whether a plaintiff asserting a Section 2 vote dilution claim must always be able to draw a district in which the minority group would constitute an absolute numerical majority. This Court has expressly reserved that question, and the issue implicates difficult questions in borderline cases in which a group closely approaches 50%. But this case is not a borderline case, and the district court's factual findings foreclose appellants' claim even under their expansive vote-dilution theory. Moreover, permitting Section 2 vote-dilution claims when, as here, a minority group is *substantially* less than a majority of voters in an alternative district presents a number of potentially significant concerns.

II. The district court properly rejected appellants' Section 2 challenge to the districting in South and West Texas. This Court summarily affirmed the district court's rejection of essentially the same claim in *Balderas* v. *Texas*, 536 U.S. 919 (2002). Even aside from *Balderas*, however, the district court below made two additional findings that defeat the claim. First, the court found that appellants were unable to show that more than six districts could be created in South and West Texas in which Hispanics would be able to elect the candidate of their choice. In particular, the court found that, in light of evidence of relatively low turnout among Hispanics, they would not have the opportunity to elect the candidate of their choice in a proposed district that had a Hispanic population of only 50.3%. Second, the court found that Hispanics, who make up roughly 58% of the relevant population in South and West Texas, are a majority in 85% (six of seven) of the districts in that area in the State's 2003 plan. That level of more-than-proportional representation in the relevant area strongly suggests that, under the totality of the circumstances, the State's plan does not result in a denial or abridgement of the right to vote as defined in Section 2. See *De Grandy*, 512 U.S. at 1016. Section 2, moreover, does not impose an obligation to *maximize* the number of majority-minority districts in that region. See *ibid.*

ARGUMENT

I. SECTION 2 DID NOT REQUIRE THE STATE TO INCLUDE A DISTRICT COMPARABLE TO OLD DISTRICT 24 IN ITS 2003 PLAN

A. Appellants Failed To Establish The First *Gingles* Precondition

1. Under the first *Gingles* precondition, plaintiffs challenging an existing districting plan generally must show that they could draw an alternative plan containing reasonably compact

districts in which the minority group would be sufficiently large to constitute a majority. The purpose of that requirement is to "establish that the minority has the potential to elect a representative of its own choice in some single-member district," *Growe* v. *Emison*, 507 U.S. 25, 40 (1993), a necessary prerequisite to establishing that the minority has been deprived of the "opportunity * * * to elect representatives of their choice." 42 U.S.C. 1973b. Plaintiffs bear the burden of showing that that requirement has been met. *Voinovich* v. *Quilter*, 507 U.S. 146, 155 (1993).

African Americans constitute less than 22% of the voting age population in District 24 in the court-ordered plan—the district they identified to demonstrate the first *Gingles* precondition. J.S. App. 107a. Appellants, therefore, would appear to face a formidable obstacle to establishing a majority-minority district, to say the least.[2] Appellants assert, however, that the first *Gingles* requirement nonetheless can be satisfied even at this low percentage in a "demonstration" district, so long as the district is a "coalitional district effectively controlled by one minority group." 05-276 Appellants Br. 39. Even under their own theory of the case, however, appellants had to prove that old District 24 was "effectively controlled by African-American voters," *id.* at i, in order to

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[2] Appellants on several occasions refer to District 24 as a "majority-minority" district. See 05-276 Appellants Br. 8, 16, 40. By that, appellants apparently are referring to the fact that African Americans, Hispanics, and "other" minorities constitute a majority of the voting age population—combined. That majority is itself borderline, because the district court found that African Americans and Hispanics together constitute only 46.4% of the voting age population of District 24, J.S. App. 107a, and appellants assert only 4% Asian or "other" minorities. 05-276 Appellants Br. 8. In any event, the district court found that there is "no cohesion" between African American and Hispanic voters, J.S. App. 111a, and appellants' Section 2 claim therefore rests on the contention that African Americans—who constitute less than 22% of the voting age population—exercise "effective" electoral control.

satisfy the first *Gingles* precondition. Appellants attempted to carry that burden by arguing that African Americans effectively controlled the Democratic primary and that the winner of the Democratic primary could be expected to prevail in the general election in the district.[3]

2. In a finding that is fatal to their Section 2 claim, the district court found that District 24 in the court-ordered 2001 plan was not effectively controlled by African Americans. Instead, the court found that appellants had "overstate[d] the impact of the Black Democrats' control of the primaries." J.S. App. 111a. Rather than being a "Black opportunity district," the court found that, "[m]ore accurately, * * * [District 24] is a strong Democratic district," *id.* at 110a, and "that Anglo Democrats control this district is the most rational conclusion." *Id.* at 111a-112a. Because that finding was not clearly erroneous, it is entitled to respect on appeal and forecloses appellants' claim even under their own expansive theory of Section 2 liability. See *Gingles*, 478 U.S. at 79 ("clearly erroneous test * * * is the appropriate standard for appellate review of a finding of vote dilution").

a. The record amply supports the district court's finding that African Americans lacked effective electoral control over District 24. For example, there was direct evidence "that District 24 was drawn for an Anglo Democrat," J.S. App. 111a; see *id.* at 107a (similar), regardless of whether he is the candidate of choice of the African American minority. Congresswoman Eddie Bernice Johnson, an African American who represented the neighboring, majority-African American District 30 in the 2001 plan, had served in 1991 on a state legislative committee that addressed congressional redistricting. J.A. 262-263. She testified at trial that, in 1991, African

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[3] Appellants do not argue that a plan in which a State allegedly fails to draw "influence districts"—*i.e.*, districts which, by definition, the minority group does not effectively control, see *Georgia*, 539 U.S. at 482—violates Section 2.

American communities in that area had been divided "to elect White Democrats," including Congressman Frost. J.A. 264. She also testified that the motivation for District 24 in the 1991 plan was "to accommodate others," and, in particular, "White Democrats." J.A. 265. The district court heard that testimony about the original intent for creating District 24, and the court relied on it in concluding that the intent had been realized. See J.S. App. 107a, 111a.[4]

In addition, the district court examined appellants' proof of actual election results in District 24 congressional elections. No African American ever won election to Congress in old District 24. It is true that Frost received the votes of African-Americans in the Democratic primary. But, as the court found, that fact is not probative, because Frost not only was running with the advantages of incumbency, but also "ha[d] not had a primary opponent since his incumbency began" in the currently configured District 24. J.S. App. 111a. Indeed, the court found that the fact "[t]hat no Black candidate has ever filed in a Democratic primary against Frost in a district assertedly controlled by Blacks reflects the accuracy of Congresswoman Johnson's claim that District 24 was drawn for

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[4] Similarly, Democratic state legislator Ron Wilson, when asked whether "District 24 * * * is a District that would elect a Black for Congress if pitted against an Anglo," responded "There's no way. There's absolutely no way it can happen." J.A. 277. To be sure, some "local African-American leaders" testified that "Congressman Frost went unchallenged in the African-American-dominated primaries precisely because he was the black voters' candidate of choice." 05-276 Appellants Br. 42 n.35 (citing statements of former Mayor Ron Kirk, Commissioner Roy Brooks, and Congressman Frost himself). However, especially in light of the obvious potential partisan motivation underlying the testimony of Democratic officeholders and of Congressman Frost himself, the court was entitled to decline to give their testimony dispositive weight.

an Anglo Democrat," not to attempt to provide control to an African American minority of 22%. *Ibid.*[5]

While African Americans constituted less than 22% of the voting age population of old District 24, Anglos were close to 50% of the CVAP. Texas has an open primary system, in which individuals can choose to vote in any party's primary on election day. See Tex. Elec. Code Ann. §§ 63.001, 162.002-162.003, 162.010 (2003); see also Michael Barone & Richard E. Cohen, *The Almanac of American Politics* 1575 (2006) ("Texas does not have party registration, and so turnout in each party's primaries is a fair index of party preference."). In those circumstances, it is not surprising that Anglos—not African Americans, who were only the third largest ethnic group in the district and comprised only about one-fifth of its population—would control the district. And if the district is solidly Democratic (as appellants assert), the "most rational conclusion" is that Anglo Democrats would control the district, as the district court found. J.S. App. 111a-112a.[6]

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[5] The district court also noted that District 25 under the court-ordered 2001 plan had "demographics * * * strikingly similar" to the demographics in District 24. J.S. App. 109a. The percentage of African American voters in District 25 was identical to District 24 (21.4%), and the Hispanic population was very close. *Ibid.* Yet, in the 2002 Democratic primary in District 25, the white candidate, Bell, "defeated Carroll Robinson, the Black candidate of choice." *Ibid.* That evidence also supports the district court's factual finding.

[6] Appellants assert that Anglo Democrats, who they say—without record citation—constitute "only about 18% of the district's general electorate," had "no ability to control who the party nominated." 05-276 Appellants Br. 41 n.33. Even assuming that the 18% figure is accurate, Anglo Democrats were not substantially fewer in number than African Americans (22%), who appellants argue *do* control the district. More important, Anglo Democrats could control the district because Texas operates an open primary system, in which all voters—including Republicans and independents—can vote in the Democratic primary. The district court reasonably concluded that African Americans, who vote primarily Democratic and therefore do not have that potential to tap same-race non-Democratic voters, do not control the district.

b. Appellants have not shown that the court's factual finding that African Americans lacked effective control was clearly erroneous. They argue (without citation) that "in 19 of 20 recent general elections for statewide office, the candidate preferred by black and Latino voters carried this district." 05-276 Appellants Br. 42. Because that statistic refers only to general elections and to the candidate "preferred by black *and* Latino voters," it casts no doubt on the district court's conclusion that, in an election in which African American voters (not including Latino voters) and Anglo voters have a different candidate of choice, Anglo voters—and Anglo Democrats, in particular—would have prevailed.[7]

Appellants also emphasize that African Americans constituted 64% of the voters in the Democratic primary in old District 24. As the district court pointed out, however, appellants' claim crucially depends on the premise that "much of the dominating Anglo Democratic vote does not bother to vote in the primary with Frost filing as an unchallenged Anglo." J.S. App. 111a. The district court could reasonably conclude that exceptionally low turnout by Anglos indicates only that Anglos are content with the likely outcomes of those races. It does not indicate that Anglos, with their much larger numbers, do not control the district, or that they would not turn out to vote in Texas's open primary in the relevant scenario, *i.e.*, if a candidate whom they opposed but who was the candidate of choice of the African American voters was running. As the district noted, it "ha[d] no measure of what Anglo turn-

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[7] Appellants do not challenge the district court's finding that "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections," J.S. App. 99a; see *id.* at 111a, and appellants do not argue that the district court erred in precluding on that basis a claim that the State's 2003 plan diluted the vote of the two groups together, even assuming such aggregation were permissible under Section 2. See *Growe*, 507 U.S. at 41 (assuming without deciding that aggregation is permissible under Section 2).

out would be in a Democratic primary if Frost were opposed by a Black candidate." *Ibid.*[8]

c. In short, the district court reasonably found that African American voting strength in District 24 was insufficient to enable African Americans to control the district. Given that African Americans comprised less than 22% of the voting age population, that conclusion is not surprising. Because the district court's finding was fatal to appellants' expansive theory of how they could satisfy the first *Gingles* precondition, the district court correctly rejected appellants' Section 2 claim concerning old District 24.

B. This Case Does Not Require The Court To Decide Whether A Minority Group Must Always Show That It Is A Majority To Establish A Section 2 Claim

In challenging the district court's Section 2 ruling with respect to District 24, appellants claim that the district court erred in grounding its decision on the understanding that "the only districts that 'count' under Section 2 * * * are those in which one minority group constitutes a mathematical majority of the population." 05-276 Appellants Br. 16, 33-43. Appellants' argument is mistaken. Appellants' own expansive theory of how a less-than-22% district could satisfy the first *Gingles* precondition depended on factual premises the district court rejected, and the district court accordingly did not base its decision on a simple application of the 50% rule. It is therefore unnecessary for the Court to decide in this case whether a minority group must always establish that it represented an absolute majority of voters to invoke Section 2.

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[8] To be sure, minority voters may vote for candidates of a different race or ethnicity. See *De Grandy*, 512 U.S. at 1027 (Kennedy, J., concurring). In this case, however, the district court found that appellants had not shown that Frost could be regarded as the candidate of choice of African-Americans for purposes of analyzing their Section 2 claim. That finding is not clearly erroneous. See p. 14, *supra*.

1. Avoiding a definitive ruling on the 50% rule here would be consistent with the Court's past practice. In *Gingles*, this Court held that a precondition to stating a Section 2 claim is that "the minority group must be able to demonstrate that it is sufficiently large and compact to constitute a *majority* in a single-member district," 478 U.S. at 50 (emphasis added), and the Court has repeatedly reiterated that requirement in subsequent cases. See, *e.g.*, *Georgia*, 539 U.S. at 478; *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997); *De Grandy*, 512 U.S. at 1006; *Growe*, 507 U.S. at 40-41. Nonetheless, in *Gingles* the Court also stated that it had "no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46 n.12; see *id.* at 89 n.1 (O'Connor, J., concurring in the judgment). The Court similarly reserved the question in *Growe*. See 507 U.S. at 41 n.5. In *Voinovich*, the Court assumed, without deciding, that such claims were possible. See 507 U.S. at 154. Likewise, in *De Grandy*, the Court "assume[d] without deciding" that *Gingles* could be satisfied "even if [members of the minority group] are not an absolute majority of the relevant population." 512 U.S. at 1009.[9]

2. The position of the United States on this issue over the years underscores the wisdom of resolving the issue in a concrete setting that clearly poses the issue. In *Voinovich*, the

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[9] In *Parker* v. *Ohio*, 263 F. Supp. 2d 1100 (S.D. Ohio 2003), this Court summarily affirmed the decision of the three-judge court rejecting a Section 2 challenge to a state apportionment plan. 124 S. Ct. 574 (2003). The district court rejected the argument that the first *Gingles* precondition could be met where "a distinct [minority] group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections," 263 F. Supp. 2d at 1104, and appellants challenged that ruling. See 03-411 J.S. at i, 13-23. Appellees defended the district court's ruling, see 03-411 Mot. to Aff. at 14-19, and also advanced alternative bases for affirmance. See *id.* at 19-24.

United States stated that it "agree[d] with those courts that have rejected" the assumption "that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population." Br. for the U.S. as Amicus Curiae at 16, *Voinovich* v. *Quilter* (No. 91-1618). As the government explained, "[u]nless a minority group can demonstrate that it *could* constitute a majority in a single-member district so as to enable it to elect its preferred candidates, the alleged fragmentation of that group's voters into multiple districts could not possibly have denied that group an equal 'opportunity * * * to elect representatives of [its] choice.' " *Id.* at 11 (quoting 42 U.S.C. 1973(b)); see *id.* at 11-12 n.6 (citing cases). Similarly, in *Growe*, the United States argued that, "[a]bsent proof that the plaintiff minority group could form a majority of a single-member district, that group 'cannot claim to have been injured by' the challenged districting scheme." Br. for U.S. as Amicus Curiae at 7, *Growe* v. *Emison* (No. 91-1420); see also *id.* at 11 & n.6.

The United States has also recognized that the majority requirement of the first *Gingles* precondition might be relaxed in certain specific situations. First, "the requirement that the minority group be sufficiently numerous and compact to constitute a majority of a single-member district may be relaxed where intentional racial discrimination has been shown." 91-1420 U.S. Br. at 12 n.6 (citing *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991)). See U.S. Br. in Opp. at 21, *County of Los Angeles* v. *Garza* (Nos. 90-849 & A-422). Second, the government has argued that a "flat 50% rule" was inappropriate when the minority group was "compact, politically cohesive, and substantial in size *yet just short of a majority.*" Br. for the U.S. as Amicus Curiae at 11, 13, *Valdespino* v. *Alamo Heights Indep. Sch. Dist.* (No. 98-1987) (emphasis added). In that situation, the government explained, a "small amount of

consistent crossover voting" might give "the minority voters the potential to elect their representative of choice." *Id.* at 11; see *id.* at 12 n.3 ("[a]t some point, of course, the amount of crossover voting may be sufficiently substantial that it would not be possible to sustain a finding that voting is racially polarized or that the majority votes as a bloc to defeat the candidate preferred by minority voters").[10] But this case involves neither claims of intentional discrimination, nor the kind of near-50% borderline case alluded to in the *Valdespino* brief. Under the circumstances, there is no need for the Court to resolve the validity of a strict 50% rule.[11]

3. Permitting Section 2 vote-dilution claims when, as here, a minority group is substantially less than a majority of the voters in an alternative district raises a number of potentially

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[10] The plaintiff minority group in *Valdespino* represented "48% of the CVAP." 98-1987 U.S. Br. at 13. In its brief, the government repeatedly referred to the fact that the minority group was "just short of a majority." *Id.* at 11; see *id.* at 10 ("slightly less than 50%"). The United States also filed an amicus brief in *Perez* v. *Pasadena Indep. Sch. Distr.* (No. 98-1747), which involved similar circumstances, in which the government reiterated its position in *Valdespino*. See 98-1747 U.S. Br. at 7-8 ("[p]etitioners have shown that Hispanics would be very close to a majority of the CVAP in their demonstration district"). In two appellate court briefs, the United States took the position that plaintiffs need not show that they would constitute 50% of a demonstration district to prevail under the first *Gingles* precondition. See Br. for the United States at 35, *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (No. 92-749), cert. denied, 498 U.S. 1028 (1991); see also Br. for United States at 12-17, *Campos* v. *City of Houston*, 113 F.3d 544 (5th Cir. 1997) (No. 90-849).

[11] The large majority of lower courts that have addressed the issue have embraced the 50% rule. See, *e.g.*, *Hall* v. *Virginia*, 385 F.3d 421, 429-431 (4th Cir. 2004), cert. denied, 125 S. Ct. 725 (2005); *Valdespino* v. *Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-853 (5th Cir. 1999), cert. denied, 528 U.S. 1114 (2000); *Cousin* v. *Sundquist*, 145 F.3d 818, 828-829 (6th Cir. 1998), cert. denied, 525 U.S. 1138 (1999); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 943-945 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); but see *Metts* v. *Murphy*, 363 F.3d 8, 11-12 (1st Cir. 2004) (en banc) (declining "to foreclose the *possibility*" that a Section 2 claim might be viable where the minority is less than 50%).

significant concerns. First, when, as here, the minority group is substantially less than a majority and depends on a high level of crossover voting to show that it nonetheless exercises electoral control (see J.S. App. 111a), it is doubtful that the plaintiff can show that racially polarized voting—as opposed to other local factors or conditions—has led to a decrease in its electoral opportunities. Such crossover voting indicates to the contrary that a district may not suffer from the kind of race-based voting that led to the enactment of the Voting Rights Act. See *Metts* v. *Murphy*, 363 F.3d 8, 12 (1st Cir. 2004) ("To the extent that African-American voters have to rely on cross-over voting to prove that they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their candidate is undercut."); see *id.* at 13-15 (Seyla, J, joined by Torruella, J., dissenting) ("[a] showing of majoritarian bloc voting is structurally inconsistent with" a minority group's "reliance on a high level of crossover voting" to assert electoral control).[12]

Second, recognizing such claims under Section 2 could compromise needed flexibility that the Court has recognized in an analogous setting under Section 5 of the Voting Rights Act.

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[12] Indeed, efforts like appellants' to hypothesize control with relatively low percentages of CVAP require assumptions about voting behavior that suggest other factors are at work. Under appellants' theory, a minority group can control a district because it constitutes a majority in the Democratic primary even if it is only 22% of the population. The theory relies on the proposition that white Democrats, who do not control the district, would prefer the minority candidate of choice in the general election. But if there were sufficient white voters willing to carry the district for the candidate of choice of a 22% minority in the general election, voting in the district would not be racially polarized in the first place, but instead would be explicable on the basis of non-racial factors. Moreover, in light of the open primary system in Texas, appellants' theory appears to assume that at the same time that Democratic voters vote on racial lines in an open Democratic primary, Republican voters would not be motivated to cast votes-along similar racial-lines in the open Democratic primary.

In *Georgia* v. *Ashcroft*, the Court rejected the argument that the States are required to maximize the number of majority-minority "safe" districts and, instead, held that "Section 5 leaves room for States to use * * * influence and coalition districts" as well, "even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice." 539 U.S. at 483, 489-490; see *id.* at 482 ("Section 5 gives States the flexibility to choose one theory of effective representation over another"). Permitting minority groups with as little as 22% of the population to pursue Section 2 litigation in the wake of a redistricting could discourage States from redistricting in ways "that would truly 'maximize' minority electoral success," *Gingles*, 539 U.S. at 480 (O'Connor, J., concurring in the judgment), such as by moving minority voters from 22% districts to districts in which they have a greater population and greater chance of success or pursuing similar efforts.

Third, if the Court recognized the viability of Section 2 claims where, as here, the plaintiff group was substantially less than a majority of the voters, then a great many districts could be subject to fact-intensive litigation under Section 2. At a minimum, such a ruling could substantially increase the volume and nature of Section 2 litigation. Cf. *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) ("Courts might be flooded by the most marginal Section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections."). Likewise, to the extent that plaintiffs could pursue Section 2 claims with as little as 22% of the voting population, it would be difficult to establish an obvious end point and judicially administrable standards for recognizing vote-dilution claims by minority groups with only a small fraction of voters. Cf. *Holder* v. *Hall*, 512 U.S. 874, 885 (1994) (plurality); *id.* at 889-890 (O'Connor, J., concurring in the judgment).

Fourth, extending Section 2 beyond its intended reach not only could disrupt the traditional workings of our representative democracy, but could inflict other harms. The Voting Rights Act was intended "to hasten the waning of racism in American politics," *De Grandy*, 512 U.S. at 1020, not to ensure that "race predominates in the redistricting process," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1996), a situation that would raise constitutional concerns that Congress presumably seeks to avoid. See *Georgia*, 539 U.S. at 490-491 ("[T]he Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life."). If Section 2 prevented legislatures from redrawing districts in which minorities constituted only a small fraction of voters, then race could become a predominant factor in a great many redistricting decisions.

4. Contrary to appellants' contention (05-276 Appellants Br. 16, 39), the district court in this case did not rest its ruling on a "mechanical" application of the 50% rule. Indeed, if the court had done so, it could have simply recited the undisputed fact that African Americans comprise less than 50% of the voting age population in District 24, and ended its inquiry. The district court instead stated that "the facts of this case offer no occasion to decide if there is a tolerable deviation from the rule that a minority must demonstrate that * * * it had the potential to elect a candidate of its choice by proof that it could constitute 50% of the district." See J.S. App. 96a. The district court's factual findings with respect to electoral control resolve the District 24 vote dilution claim without regard to the 50% rule.

Accordingly, this case does not require the Court to decide whether a plaintiff minority group must always show that it represents a majority of the voting age population in a district

to state a claim under Section 2. The Court should therefore defer passing on that issue until it is faced with a case in which resolution of the question would likely be dispositive, such as a case in which the plaintiff minority group was only slightly less than a majority in the demonstration district. Such a case would offer the Court the benefit of a concrete factual setting in which to resolve that issue.[13]

II. SECTION 2 DID NOT REQUIRE THE STATE TO CREATE SEVEN MAJORITY-HISPANIC DISTRICTS IN SOUTH AND WEST TEXAS

A. Appellants Failed To Establish That Seven Effective Majority-Hispanic Districts Could Be Drawn In South And West Texas

Appellants GI Forum, et al., challenge the State's 2003 plan—as they did the court-ordered 2001 plan upheld in *Balderas*—on the ground that it violates Section 2 because it creates six, rather than seven, majority-Hispanic districts in South and West Texas. This Court rejected essentially the same claim in *Balderas*. See 536 U.S. at 919. To the extent that the Court believes it necessary or appropriate to revisit this issue, the district court properly rejected that claim below.

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[13] Because the record supports the district court's conclusion that appellants failed to meet the first *Gingles* precondition, there is no need for the Court to examine the other preconditions. In any event, as noted above, the district court also properly determined that appellants had not clearly demonstrated that the African American voting age population is cohesive. See J.S. App. 112a. In addition, the district court stated that the relatively high level of white crossover voting (30.75%) established the "absence of Anglo bloc voting under *Gingle*'s third precondition." *Id.* at 111a; see J.A 260-262. Moreover, appellants have also failed to establish that they could prevail under a "totality of the circumstances" analysis, which provides an independent reason for rejecting their Section 2 challenge to District 24.

1. Appellants introduced a plan (Plan 1385C) in support of their claim, which outlined seven districts in South and West Texas with a majority-Hispanic CVAP. See 05-439 J.S. App. 241 (Plan 1385C map); see also J.S. App. 133a n.136 (Hispanic CVAP percentages). Both that plan and the State's 2003 plan have "the same number of districts"—six—"in which Latinos equal or exceed 55% of the citizen voting age population." *Id.* at 132a; see *id.* at 133a n.136. All six of those districts in the State's plan would effectively permit Hispanics to elect the candidate of their choice. See *id.* at 133a-148a. Thus, appellants' claim required proof that the seventh district in their plan would effectively function to permit Hispanics to elect the candidate of their choice. Without such proof, a court would have no basis to conclude that the State's plan abridged the opportunity of Hispanics in violation of Section 2.

2. The district court found that the seventh district in the GI Forum plan would not effectively function as a Hispanic opportunity district. That district "has a Hispanic citizen voting age population of only 50.3%." J.S. App. 130a. The court found that "because of the lower turnout of Latino voters, a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district." *Id.* at 131a. Appellants therefore had not shown that "seven [Hispanic-majority] districts * * *, if they could be drawn, would function effectively as Latino opportunity districts." *Id.* at 133a. The court thus "reject[ed] the claim * * * that § 2 demands a seventh Hispanic citizen voting age population majority district in South and West Texas." *Ibid.*

The district court's finding was well supported. Appellants themselves had argued that three of the districts in the State's plan—each of which had a Hispanic CVAP of more than 55%—would not provide effective opportunity for Hispanics. J.S. App. 131a. Dr. Jerry Polinard, a political scientist, testified that "you become comfortable with opportunity

districts once you break into those 60%-plus ranges." *Id.* at 131a n.134. Dr. Allan Lichtman, another political scientist, testified that lowering the Hispanic CVAP in a district may approach "the danger zone" for opportunity, even if the Hispanic CVAP remains over 50%. *Ibid.* Congressman Hinojosa testified that "because of the low [relative] turnout," "in order to win an election, you need to have about 57, 58% or higher Hispanic voter age population." *Ibid.* Congressman Gonzalez testified that a mere majority in numbers "doesn't translate to having an effective voice or ability to elect someone of your choice" because of relatively low Hispanic registration and turnout figures. *Ibid.* Combining that testimony with the bare-majority 50.3% CVAP, the court found that appellants' seventh district would not "function effectively as [a] Latino opportunity district[]." *Id.* at 133a. That finding was not clearly erroneous, and it alone defeats appellants' claim.

3. Appellants argue (05-439 Appellants Br. at 46) that evidence shows that the 50.3% district in their plan (District 28) would elect the Hispanic candidate of choice, and that the district court improperly "relied upon the testimony of GI Forum's expert witness to conclude that the State Plan contained six Latino opportunity districts while ignoring those portions of his analysis showing that the GI Forum plan contained seven Latino opportunity districts." *Id.* at 45-46. A trial court, however, is permitted to accept some conclusions and reject others advanced by an expert witness. In addition, as noted, the challenged finding was based not just on one witness's evidence, but on a variety of evidence introduced by a number of different witnesses. Moreover, there was nothing inconsistent in the district court's conclusion that the six districts in the State's plan—with 55% or more Hispanic CVAP—would function as opportunity districts, while the bare-majority 50.3% district would not. Appellants fail to show that that dispositive finding was clearly erroneous.

B. In Any Event, The More-Than-Proportional Electoral Opportunities For Hispanics In South And West Texas Support The District Court's Rejection Of That Claim

There is an additional reason why appellants' claim fails. In the seven-district South and West Texas area, Hispanics constitute 58% of the CVAP. Six of the seven districts in that area—or 85% of the districts—are majority Hispanic CVAP. Based on that calculation, the district court concluded that "proportionality is satisfied as to that area." J.S. App. 129a.

1. In *De Grandy*, this Court addressed a similar argument. Noting that "equal political opportunity" was "the focus of the enquiry," the Court stated that it did "not see how * * * district lines, apparently providing political effectiveness in proportion to voting age numbers, deny equal political opportunity." 512 U.S. at 1014. The Court observed that such proportionality "would thwart the historical tendency to exclude Hispanics, not encourage or perpetuate it," and that there accordingly were "no grounds for holding * * * that [the] district lines diluted the votes cast by Hispanic voters" in the challenged plan." *Id.* at 1014-1015. While not in itself dispositive, the Court therefore concluded that "proportionality * * * is obviously an indication that minority voters have an equal opportunity." *Id.* at 1020. In addition, the Court held that Section 2 does not require a State to *maximize* the number of "safe" districts in an area. *Id.* at 1016-1017.

De Grandy seriously undercuts appellants' argument here. While the minority groups in *De Grandy* enjoyed only "rough proportionality," 512 U.S. at 1023, Hispanics in South and West Texas enjoy representation—six of seven districts—far greater than their proportion of the population, no matter how it is measured. Accordingly, appellants' claim that they are entitled to an additional majority-Hispanic district in South and West Texas should be rejected.

2. Appellants argue that the State nonetheless violated Section 2 by reconfiguring District 23 so that it had less than a majority-Hispanic CVAP, even though at the same time the State created a new majority-Hispanic district east of District 23 in South Texas. See 05-439 Appellants Br. at 36. In their view, such a reconfiguration is prohibited by *Shaw* v. *Hunt*, 517 U.S. 899, 917 (1996), which stated that, "[i]f a § 2 violation is proved for a particular area," the "vote dilution injuries suffered by [minority-group members in that area] are not remedied by creating a safe majority-black district somewhere else in the State." That contention is mistaken.

First, the *Shaw* rationale by its terms applies only if "a § 2 violation is proved for a particular area." Appellants have not proved a Section 2 violation for the area of District 23; to the contrary, the question in this case is whether they can prove a Section 2 violation for any area in South and West Texas, and the greater-than-proportional representation of Hispanics in that area strongly suggests that they cannot.

Second, *Shaw* rejected a claim that "once a legislature has a strong basis in evidence for concluding that a § 2 violation exists in the State, it may draw a majority-minority district anywhere." 517 U.S. at 916-917. In this case, by contrast, the State does not assert that it could draw a majority-Hispanic district *anywhere* in Texas to avoid an otherwise proven Section 2 claim in South and West Texas. Rather, the state legislature considered the southwest part of the State as a whole, and it drew a series of districts there to achieve a variety of purposes, including to provide representation for Hispanic citizens. Although large in geographical size, the area contains certain common features, such as the shared Mexican border, a generally sparse population, and, indeed, a large Hispanic population. Within that area, as the Court recognized in *De Grandy*, "some dividing by district lines and combining within them is virtually inevitable and befalls any pop-

ulation group of substantial size." 512 U.S. at 1015. The Court concluded in *De Grandy* that "[a]ttaching the labels 'packing' and 'fragmenting' to these phenomena, without more, does not make the result vote dilution when the minority group enjoys substantial proportionality." *Id.* at 1015-1016. So too here.

Finally, accepting appellants' theory would require States in many instances to freeze existing districting configurations wherever majority-minority districts exist. Whenever the State reconfigured districts in a particular area in such a way as to decrease the minority population in one district while increasing it in another, neighboring area, a plaintiff could claim that the State had violated Section 2 with respect to the former district. This Court has never suggested that Section 2 permanently freezes into place particular districting configurations or gives particular minority-group members veto power over alternative districting configurations that may well serve other legitimate state interests and, indeed, advantage other neighboring minority-group members.

3. Appellants briefly argue that Hispanics in the State as a whole constitute 24.5% of the CVAP, and that they therefore are entitled to 24.5% of the 32 congressional districts in Texas, or 7.82 districts. They contend that "[t]he District Court should have concluded that eight opportunity districts would provide proportional political representation to Latinos in Texas and that the State plan falls well short of this number." 05-439 Appellants Br. at 49. That argument is mistaken. In *De Grandy*, the Court was presented with a similar statewide proportionality claim. But because the case before it had in fact been "litigated on a smaller geographical scale" than statewide, the Court held that it was appropriate to consider proportionality on the same scale. 512 U.S. at 1022. The district court reasonably relied on precisely the same reasoning here to conclude that South and West Texas is the appro-

priate geographic frame of reference in this case. J.S. App. 129a & n. 131.

Indeed, the South and West Texas geographic frame of reference is particularly appropriate in this case. Hispanics are so far *over*-represented in South Texas (and sufficiently close to achieving proportionality statewide) that even use of a much broader frame of reference than South and West Texas would not alter the result here. As noted above, far from an arbitrarily defined region of the State, South and West Texas has a variety of characteristics that make it an appropriate frame of reference for Section 2 analysis.

CONCLUSION

The Court should affirm the district court's judgment that the State's redistricting plan does not violate Section 2 of the Voting Rights Act.

Respectfully submitted.

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Nos. 05-204, 05-254, 05-276 & 05-439

In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

TRAVIS COUNTY, TEXAS, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

EDDIE JACKSON, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

GI FORUM OF TEXAS, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

On Appeal from The United States District Court For the Eastern District of Texas

BRIEF *AMICUS CURIAE* OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AND FREE ENTERPRISE COALITION IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

Does Article I, § 4 prohibit state legislatures and/or voters exercising their reserved legislative power through the initiative, from redistricting more than once in a decade, thereby eliminating the possibility of political remedies to post-census partisan gerrymanders, and increasing the frequency of lawsuits challenging such gerrymanders?

Does Article I, § 4 require federal court-ordered redistricting plans to remain in effect during an entire decade, insulated from any changes by subsequent redistricting legislation enacted by the Legislature or the voters of the state by initiative?

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

The American Legislative Exchange Council ("ALEC") is the nation's largest nonpartisan individual membership association of state legislators. ALEC has more than 2,400 members, comprising approximately one-third of all state legislators in the United States. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve economic liberty. It is also generally concerned with matters of legislative accountability and governmental structure. ALEC serves as a "think tank" on many specific legislative issues and provides for its members a variety of additional resources, including a number of publications, a website (www.alec.org), and affiliation with more than 300 corporate and private foundation members. ALEC's interest in this proceeding is the protection of the state legislatures' authority over redistricting, thereby promoting the vital principle of federalism (ALEC represents *state* legislators) and a sound separation of powers (ALEC represents state *legislators*) in the areas of redistricting and elections—domains traditionally entrusted to the care of the state legislatures. U.S. CONST. art. I, § 4.[1]

The Free Enterprise Coalition ("FEC") is a non-profit organization incorporated in the State of Virginia. The Coalition's purpose is to engage in activities that promote policies that are supportive of the free enterprise system. The Chairman of FEC is Robert L. Livingston. For the past two years the coalition has concentrated on ensuring fair

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[1] As required by Rule 37.3(a) of this Court, *amicus curiae* have sought and received the written consent of all parties to file this brief presented. Copies of letters of consent signed by counsel are filed herewith with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus curiae* state that none of the parties authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.